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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/831,301	05/08/2001	Robert W. Killick	038441/0104	2790

22428 7590 08/22/2003

FOLEY AND LARDNER
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3000 K STREET NW
WASHINGTON, DC 20007

EXAMINER

PRYOR, ALTON NATHANIEL

ART UNIT	PAPER NUMBER
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1616

DATE MAILED: 08/22/2003

17

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

9/831,301

Applicant(s)

KILLICK ET AL.

Examiner

Alton N. Pryor

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-- The MAILING DATE of this communication appears on the cover sheet with the corresponding address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on 29 May 2003.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☐ Claim(s) 1-30 and 32-45 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) 34-38 and 41-45 is/are allowed.
- 6) ☐ Claim(s) 1,2,4,11,15-20,22,27,29,30,32,33,39 and 40 is/are rejected.
- 7) ☐ Claim(s) 3,5-10,12-14,21,23-26,28 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____
- 4) ☐ Interview Summary (PTO-413) Paper No(s) _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

Response to Arguments

Applicant's arguments filed 5/29/03 have been fully considered but they are not persuasive.

A. Rejection of claims 1,2,4,11,15-20,22,27,29,30,32,33,39,40 under 35 USC 103(a) on record will be maintained for reasons on record and reasons as follows.

I. Applicant argues that both Saphakkul and JP '898 discloses aqueous compositions wherein water is the solvent. Examiner argues that Applicant's claims use the open language "comprising" which allows for the presences of water. The formality of the instant claims allows for the water to be present in the majority. For example, claim one as amended allows for the lipophilic solvent to be slightly about 5%. For example, instant composition comprises a lipophilic solvent which can be present at 5.00001 wt %, less than 1% lipophilic plant nutrient, less than 1% cationic emulsifier. In such a composition, water is present in more than 94%.

II. Applicant argues that the claims as amended are directed to an agricultural composition comprising greater than 5% lipophilic solvent. Applicant argues that Examiner construes the "fatty alcohol" as the claimed lipophilic solvent. However, Applicant argues that Saphakkul clearly teaches that the fatty alcohol is not the solvent, but is present to form a distinct phase within the aqueous hair dye composition. Examiner argues that Saphakkul teaches a hair dye composition that has 5% fatty alcohol; whereas, Applicant amended claims incorporate greater than 5% (5.00001 wt %) fatty alcohol. Examiner argues that Applicant provides no unexpected data for prior

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art having 5% fatty alcohol versus Applicant's composition having slightly greater than 5% (5.00001%) fatty alcohol. Examiner also reiterates that the instant claims are open to aqueous compositions / systems. See I above. It is also important to note that in a claim to a composition / method of composition preparation, a statement to intended use of the composition has no patentable significance. Therefore, the fact that Saphakkul may suggest that the fatty alcohol is used to create a distinct phase within the aqueous hair dye is insignificant. However, what is significant is that Saphakkul teaches a composition comprising 5% fatty alcohol which is lipophilic, and therefore, can be considered the lipophilic component of the instant claims.

III. Applicant argues that references cited by the Examiner are in an art which is non-analogous to instantly claimed invention. Applicant argues that Saphakkul and JP '898 relates to hair products and that a person of skill in the art would not have been motivated to combine the references to solve the problem of providing a stable homogenous blend as instantly claimed. Applicant also argues that there exist no motivation for combining Saphakkul and JP '898. Examiner argues that the obviousness in making a composition does not lie solely on whether the art is analogous or non-analogous, but rather on the determination that the prior art suggests the composition. In the present case both Saphakkul and JP '898 teach hair treatment compositions; where prior art references teach the same utility, it is obvious to combine them. In this case, the combination of cited references makes instant composition obvious.

IV. The rejection of claim 33 is maintained. Applicant argues that claim 33 relates to a method of treating vegetation with claimed composition. Examiner argues that claim

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33 teaches basically a composition. Claim 33 does not recite the active step of applying the composition to vegetation.

B. Objection to claims 3,5-10,12,13,14,21,23-26,28 is maintained. The allowance of claims 34-38,41-45 is maintained. See paper no. 15.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Telephonic Inquiry

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Alton N. Pryor whose telephone number is 703 308-4691. The examiner can normally be reached on 8:00 a.m. - 4:30 p.m..


If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Thurman Page can be reached on 703-308-2927. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306.

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Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703 308-1235.


ALTON N. PRYOR
PRIMARY EXAMINER
Alton Pryor
Patent Examiner
AU 1616